

September 15, 2009

Ambassador Ron Kirk  
United States Trade Representative  
600 17th Street, N.W.  
Washington, D.C. 20508

Re: General Comments on Free Trade Agreements with Republic of  
Colombia and Republic of Korea, Docket No. USTR-2009-0020

Dear Ambassador Kirk,

This letter responds to your office's requests for public comment on the pending free trade agreements ("FTAs") that the United States has negotiated with the Republic of Colombia (Colombia) and the Republic of Korea (South Korea). 74 Fed. Reg. 37,084 (July 27, 2009) and 74 Fed. Reg. 37,759 (July 29, 2009).

As you may know, the American Bar Association has spent considerable time and effort over many years to establish and strengthen the Rule of Law both here in the United States and throughout the rest of the world. It was in this spirit that our House of Delegates last year passed a resolution lauding the Rule of Law contributions made by FTAs like those negotiated with Colombia and South Korea:

**RESOLVED**, That the American Bar Association supports the contribution that the negotiated liberalization of international trade in goods and services, through government-to-government trade agreements, makes to the spread of the Rule of Law both at the state-to-state level and within participants' domestic legal systems.<sup>1</sup>

As was acknowledged in the Report accompanying that Resolution, achieving trade liberalization through FTAs is controversial. We are not writing now to endorse trade liberalization generally, or to take a position on the economic merits of the trade concessions in the FTAs negotiated with Colombia and South Korea. We do hope to ensure, however, that the Rule of Law benefits of these FTAs are duly credited during the public and government-internal debates over their implementation.

The ABA has defined the "Rule of Law" as "a system of transparent, predictable, understandable, and fair rules and institutions that facilitates the efficient and just functioning of societies."<sup>2</sup> Respect for the Rule of Law is necessary for stable and predictable economic relations. FTAs generally advance Rule of Law principles because, for example, they contain nondiscrimination provisions (national treatment and most-favored-nation treatment) and are designed to foster a stable and predictable framework for the cross-border exchange of goods and services.

<sup>1</sup> Available (with accompanying Report) at [http://www.abanet.org/intlaw/leadership/policy/APPFTA-ROL\\_Report\\_&Recommendation.pdf](http://www.abanet.org/intlaw/leadership/policy/APPFTA-ROL_Report_&Recommendation.pdf).

<sup>2</sup> "Rule of Law: Questions and Answers," available at [www.abanet.org/media/ceeli/rol\\_qa.pdf](http://www.abanet.org/media/ceeli/rol_qa.pdf)

We discuss below various provisions of the U.S.-Colombia and U.S.-Korea FTAs that contribute to the Rule of Law and that, accordingly, weigh favorably toward U.S. implementation.

## **1. Transparency in the Drafting, Enacting, and Application of Laws and Regulations**

Transparency is achieved when legislative proposals, as well as their rationale and objectives, are published, along with an invitation for public comment. Transparency in the enactment of laws and regulations requires a predictable process, and transparency in the application of laws and regulations requires predictable and known procedures post-legislation, a predictable review mechanism, and easy public access to the laws and regulations.

The U.S.-Korea and U.S.-Colombia FTAs both contain transparency chapters. Specifically, the U.S.-Korea FTA requires publication in a national journal of any proposed regulation affecting trade, including its purpose and rationale, with at least 40 days for interested parties to comment.<sup>3</sup> The U.S. Korea FTA also provides that parties shall maintain judicial tribunals and procedures “for purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement.”<sup>4</sup>

The U.S.-Colombia FTA also provides for notice and comment of “laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by [the FTA].”<sup>5</sup> The FTA also provides for review of laws and regulations by judicial tribunals.<sup>6</sup>

In sum, both FTAs contain provisions increasing transparency in the drafting, enactment, and application of laws and regulations.

## **2. Regulatory Strengthening**

Regulatory strengthening in an international agreement encompasses the incorporation into a domestic legal system of international norms and conventions. This incorporation should result in a more transparent, predicable, and efficient regulatory regime.

Both the U.S.-Korea FTA and the U.S.-Colombia FTA have intellectual property provisions that fit this description, requiring parties to join various international agreements governing copyright, patents, and trademarks.<sup>7</sup> Although critics of the U.S.-Colombia FTA have described the Labor chapter as lacking substance, the parties did, within that chapter, “reaffirm their obligations as members of the International Labor Organization (ILO).”<sup>8</sup>

As such, both FTAs contain regulatory strengthening provisions that advance the Rule of Law.

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<sup>3</sup> U.S.-Korea FTA Art. 21.1.3.

<sup>4</sup> U.S.-Korea FTA Art. 21.4.1.

<sup>5</sup> U.S.-Colombia FTA Art. 19.2.1

<sup>6</sup> U.S.-Colombia FTA Art 19.5.1.

<sup>7</sup> U.S.-Korea FTA and U.S.-Colombia FTA Art. 18.1.

<sup>8</sup> U.S.-Colombia FTA Art. 19.1.

### **3. Judicial Strengthening**

Judicial strengthening involves the training of judges, capacity-building of courts, and the development of specialized judicial structures. Both FTAs, in various chapters, have provisions in this category, requiring effective judicial review and (where appropriate) the creation of specialized courts to guarantee nondiscrimination and due process.

### **4. Institutional Strengthening**

This Rule of Law category includes strengthening existing institutions and creating new ones. Both FTAs have useful provisions in this category, mandating for example the creation of an Environmental Affairs Council<sup>9</sup> and a Committee on Sanitary and Phytosanitary Matters.<sup>10</sup> A number of other committees are also to be created under the FTAs.

### **5. Protection of Property Rights**

The protection of property rights, a key element of the Rule of Law, is advanced in various ways in the U.S.-Korea FTA and the U.S.-Colombia FTA. The Intellectual Property Rights chapters in both FTAs contain obligations to improve and ensure protection of IP rights. The Investment chapters likewise contain important obligations related to the protection of property rights.

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In sum, the two pending FTAs contribute to the Rule of Law because of their transparency, regulatory strengthening, judicial strengthening, institutional strengthening, and property rights provisions. If fully implemented, they will advance the Rule of Law both domestically within the signatories' territories, and at the state-to-state level. These Rule of Law benefits should be credited appropriately in U.S. government decision-making about whether, when and how to implement the agreements.

Sincerely,



Thomas M. Susman

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<sup>9</sup> U.S.-Korea FTA Art. 20.6 and U.S.-Colombia FTA Art. 18.6.

<sup>10</sup> U.S.-Korea FTA Art.8.3 and U.S.-Colombia FTA Art. Art. 6.3.